

Case Summary

Christy Cook (“Wife”) appeals the trial court’s judgment as to custody, support, and property issues in the marital dissolution proceeding she initiated against Matthew Cook (“Husband”). Husband has filed a motion to dismiss Wife’s appeal pursuant to Indiana Appellate Rule 36(B), based on his contention that her brief does not substantially comply with the Indiana Rules of Appellate Procedure. Husband characterizes Wife’s appeal as frivolous and in bad faith and requests attorneys’ fees pursuant to Appellate Rule 66(E). We grant Husband’s motion to dismiss and his request for attorneys’ fees; we also remand for a determination of those fees.

Facts and Procedural History

On June 17, 2002, Wife petitioned to dissolve her marriage to Husband. Pursuant to a referral from the Department of Child Services, both parties received parenting services from Stop Child Abuse and Neglect (“SCAN”). In November 2003, the trial court appointed a guardian ad litem (“GAL”) at Wife’s request. The trial court held a hearing that concluded on February 13, 2006, and allowed the parties to submit proposed orders.

On March 21, 2006, the trial court entered a judgment in which it divided the marital assets largely pursuant to a “marital balance sheet” that was admitted by stipulation; awarded Husband legal and physical custody of the couple’s three children, with Wife to have limited visitation; ordered that SCAN continue to monitor both parents’ homes and “offer services which assist Wife in cooperating in co-parenting and in working cooperatively with Husband[,]” with any “reports of Wife’s undermining of Husband’s custodial role with the children [to be] reported by SCAN to Husband and to the court”; ordered Wife to pay \$54.00

weekly in child support; and ordered Wife to pay the GAL's outstanding fees. Appellee's App. at 19-28.

On April 21, 2006, Wife filed a notice of appeal from the trial court's judgment. On August 14, 2006, Wife filed an original and seven copies of her appellant's brief—one copy short of the eight required by Appellate Rule 23(C)(3). None of the briefs contained a copy of the trial court's judgment as required by Appellate Rule 46(A)(10). Wife submitted a motion to file a belated brief, which the motions panel of this Court granted on August 25, 2006. Wife filed her brief on that date.

In his motion to dismiss Wife's appeal, filed September 12, 2006, Husband asserted that Wife's brief does not substantially comply with the appellate rules and further observed that Wife had failed to file an appellant's appendix as required by Appellate Rule 49. *See* Ind. Appellate Rule 49(A) (“The appellant *shall* file its Appendix with its appellant's brief.”) (emphasis added). On October 24, 2006, the motions panel of this Court issued an order holding Husband's motion to dismiss in abeyance pending a ruling by this panel and granting Husband's request to order Wife to submit an appendix. Wife submitted an appellant's appendix on November 15, 2006. On December 15, 2006, Husband filed an appellee's brief and appendix.

According to Husband's motion to supplement appendix, filed January 8, 2007, “through inadvertence, no testimony supporting the dissolution of marriage was presented at trial.” On December 18, 2006, Husband filed with the trial court a counter-petition for dissolution. On December 19, 2006, the trial court set a hearing on the motion for December 28, 2006. On December 20, 2006, Wife filed a motion for continuance and a motion to

dismiss Husband's counter-petition. On December 28, 2006, the trial court held a hearing and entered an order dissolving the parties' marriage and stating that "no issues presented by [Wife] to the Indiana Court of Appeals [are] waived by the granting of this dissolution of marriage." *Id.* at 19. On January 25, 2007, then-Chief Judge Kirsch issued an order granting Husband's motion to supplement appendix, which Husband filed five days later. To date, no additional materials have been filed in this cause.

Discussion and Decision

Husband requests that we dismiss Wife's appeal pursuant to Appellate Rule 36(B), which states that "[a]n appellee may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction." Husband contends that he is entitled to dismissal based on Wife's failure to comply with the Indiana Rules of Appellate Procedure. We agree.

"Although we prefer to dispose of cases on their merits, where an appellant fails to substantially comply with the appellate rules, then dismissal of the appeal is warranted." *Hughes v. King*, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004); *see also Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995) ("We will hold issues waived, or dismiss appeals when parties commit flagrant violations of the Rules of Appellate Procedure."), *trans. denied* (1996). The most egregious of Wife's violations of the appellate rules involve Appellate Rule 46(A), which states that "[t]he appellant's brief *shall* contain [eleven applicable] sections *under separate headings and in the following order*["] (Emphases added.)

Wife's brief does not have a separate statement of issues, statement of case, statement of facts, or summary of argument as required by Rule 46(A)(4), -(5), and -(6). Instead, Wife's brief has only three separate "issue" paragraphs, with an "argument" after each one. The first issue itself has numerous subissues, several of which are not addressed in the subsequent argument. The first two arguments consist largely of a confusing rehash of testimony favorable to Wife, contrary to Rule 46(A)(6). *See* Ind. Appellate Rule 46(A)(6)(b) ("The facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed."); Ind. Appellate Rule 46(A)(6)(c) ("The statement shall be in narrative form and shall not be a witness by witness summary of the testimony."). Wife's third argument is a one-sentence assertion that the trial court improperly calculated her child support obligation.

Wife's brief does not have a summary of argument as required by Appellate Rule 46(A)(7). Appellate Rule 46(A)(8)(a) states that the appellant's argument "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." Wife's arguments are devoid of cogent reasoning and nearly bereft of citations to (and explanations of) authorities and statutes.

We demand cogent argument supported with adequate citation to authority because it promotes impartiality in the appellate tribunal. A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator. A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues.

Young v. Butts, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (citation omitted). Wife's brief falls woefully short of this goal.¹

Yet more troubling is Wife's unsupported assertion that the trial court "grossly abused its discretion by completely ignoring not only the evidence presented on behalf of [Wife], but by ignoring the gross inconsistencies and inaccuracies of the testimony of the witnesses for [Husband], [Husband's] own testimony, and by the Trial Court interjecting of [sic] its own bias to benefit [Husband]." Appellant's Br. at 1-2. We remind Wife's counsel that we have the plenary power to order a brief stricken "for the use of impertinent, intemperate, scandalous, or vituperative language on appeal impugning or disparaging this court, the trial court, or opposing counsel." *Pitman v. Pitman*, 717 N.E.2d 627, 634 (Ind. Ct. App. 1999). Accusing a trial court of exhibiting bias is a serious matter and is not a tactic to be used simply because the court disbelieved certain witnesses and ruled against one's client. In other words, accusations are not to be used in place of arguments on the merits. *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 80 (Ind. Ct. App. 1998). We admonish Wife's counsel to refrain from making such unfounded accusations and to comply fully with the appellate rules in future proceedings before this Court.

Wife's appellant's appendix does not contain the chronological case summary (required by Appellate Rule 50(A)(2)(a)), the trial court's judgment (required by Rule 50(A)(2)(b)), page numbers (required by Rule 51(C)), or a blue back cover (required by Rule

51(E)). The appendix contains only transcript excerpts and thus does not include copies of documents, such as the marital balance sheet or the GAL's report, to which Wife refers in her argument on appeal. *Cf.* Ind. Appellate Rule 50(A)(2)(f) (stating that appellant's appendix "shall contain" copies of "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal"). In his motion to dismiss, Husband noted that Wife's counsel had failed to serve him with a copy of her motion to file a belated brief, as well as a copy of that brief, as required by Appellate Rule 24. In his brief, Husband notes that Wife's counsel also failed to serve him with a copy of the appendix. In sum, Wife's violations of the appellate rules are numerous and flagrant, and we hereby grant Husband's motion to dismiss Wife's appeal pursuant to Appellate Rule 36(B).

We also grant Husband's request for attorneys' fees pursuant to Appellate Rule 66(E), which states, "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." "In essence, damages should be assessed under this rule when an appeal is replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Montgomery v. Trisler*, 814 N.E.2d 682, 685 (Ind. Ct. App. 2004). "However, we must use extreme restraint when exercising our discretionary power to award damages on appeal because of the potential

¹ Given the numerous appellate rule violations apparent in Wife's brief, we find it interesting that Wife personally checked out the trial transcript from the trial court clerk on July 21, 2006, and returned it on August 15, 2006—the day after Wife's brief was first filed with the appellate court clerk. Appellee's Supp. App. at 11 (chronological case summary).

chilling effect upon the exercise of the right to appeal.” *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 514 (Ind. Ct. App. 2002), *trans. denied*.

“A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious.” *Manous v. Manousogianakis*, 824 N.E.2d 756, 767-68 (Ind. Ct. App. 2005).

Procedural bad faith occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant’s conduct falls short of that which is deliberate or by design, procedural bad faith can still be found.

Id. at 768 (citation and quotation marks omitted).

Wife’s flagrant disregard of the form and content requirements of the appellate rules compelled Husband to spend additional effort in drafting an appellee’s brief and a motion to dismiss and compiling an appellee’s appendix. Wife’s brief is needlessly time-consuming to read and difficult to comprehend, omits relevant facts most favorable to the trial court’s judgment, and has no discernible legal merit. We therefore remand for a determination of attorneys’ fees to which Husband is entitled pursuant to Appellate Rule 66(E).

Dismissed and remanded.

SULLIVAN, J., and SHARPNACK, J., concur.